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No. 91-258

In The

Supreme Court of the United States

October Term, 1991

R. G. BORG, WARDEN,

Petitioner,

v.

RICARDO H. ROBINSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHAUNA WEEKS
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California
90071

DENNIS E. CURTIS*
CHARLES D. WEISSELBERG
MICHAEL J. BRENNAN
University of Southern
California Law Center
University Park
Los Angeles, California
90089-0071
Telephone: (213) 740-4788

Attorneys for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a state prisoner should be foreclosed from presenting his claims for federal habeas corpus review when, contrary to the State's assertion, his confession was obtained through affirmative police misconduct in violation of the Fifth and Fourteenth Amendments.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

1. Introduction 1

2. The Interrogation 2

a. The initial advisement 2

b. Affirmative misrepresentations and misconduct by the police 3

c. Mr. Robinson's request for counsel 6

3. The State Court Proceedings 8

4. The Federal Court Proceedings 9

REASONS WHY THE PETITION SHOULD BE DENIED 11

1. This Case Does Not Present a "Mere" *Miranda* Violation: Mr. Robinson's Fifth and Fourteenth Amendment Rights Were Violated 11

a. The officers compelled Mr. Robinson to incriminate himself by refusing to acknowledge his request for counsel 11

b. The coercion in the present case goes beyond the officers' refusal to honor Mr. Robinson's request for counsel 15

2. The Reasoning of *Stone v. Powell* Does Not Apply to This Case 17

TABLE OF CONTENTS – Continued

Page

3. Congress, Not This Court, Should Decide Whether To Extend *Stone v. Powell* to *Miranda* Violations 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Roberson, 486 U.S. 675 (1988) 14

Berkemer v. McCarty, 468 U.S. 420 (1984) 20

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 22

Doyle v. Ohio, 426 U.S. 610 (1976) 13

Duckworth v. Eagan, 492 U.S. 195 (1990) 11, 18, 20

Edwards v. Arizona, 451 U.S. 477 (1981) ..... *passim*

Estelle v. Smith, 451 U.S. 454 (1981) 20

Fare v. Michael C., 442 U.S. 707 (1979) 13

Henderson v. Duggs, 925 F.2d 1309 (11th Cir. 1991) 21

Hill v. Lockhart, 927 F.2d 340 (8th Cir. 1991) 21

Lobosco v. Thomas, 928 F.2d 1054 (11th Cir. 1991) 21

Michigan v. Harvey, ___ U.S. ___, 110 S.Ct. 1176 (1990) 14

Michigan v. Tucker, 417 U.S. 433 (1974) 20

Minnick v. Mississippi, ___ U.S. ___, 111 S.Ct. 486 (1990) 12, 13

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986) 20

Oregon v. Elstad, 470 U.S. 298 (1985) 11

Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597 (1991) 20, 22

People v. Gilman and Robinson, 2d Crim. No. 42532 (Cal. App. 1984) 8

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Borg, No. 89-55126 (9th Cir. December 11, 1990) (as amended) 10, 11

Shea v. Louisiana, 470 U.S. 51 (1984) 12, 13, 17

Smith v. Illinois, 469 U.S. 91 (1984) 11

Stone v. Powell, 428 U.S. 465 (1976) 9, 17, 18, 19

Vasquez v. Hillery, 474 U.S. 254 (1986) 20, 22

Wainwright v. Greenfield, 474 U.S. 284 (1986) 13

Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam) 11

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution 15, 19

Fourth Amendment to the United States Constitution 17, 18

STATUTES AND LEGISLATIVE MATERIALS

28 U.S.C. section 2254 ..... 19, 21, 22

137 Cong. Rec. H1669 (daily ed. Mar. 12, 1991) .. 21, 22

H.R. 1400, 102d Cong., 1st Sess. (1991) 22

S. 635, 102d Cong., 1st Sess., 137 Cong. Rec. S3193 (daily ed. Mar. 13, 1991) 21

OTHER AUTHORITY

F. Inbau, J. Reid, J. Buckley, Criminal Interrogation and Confessions (3d ed. 1986) 16

STATEMENT OF THE CASE

1. Introduction

Respondent Ricardo H. Robinson was charged and convicted in Los Angeles Superior Court of felony murder, mayhem, assault with a caustic substance and conspiracy to commit mayhem in connection with the death of Patricia Worrell in 1980. Mr. Robinson, who had no prior criminal record, was not charged as a principal, but rather as an accessory to the crime. The evidence introduced at trial showed that Worrell's boyfriend, Richard Gilman, went to Las Vegas and hired a hit man, Bobby Ray Savage (aka Rick Monday), to come to Los Angeles and throw lye on Ms. Worrell. Mr. Savage was acquainted with Mr. Robinson, and learned that Mr. Robinson planned to travel to Los Angeles to visit his family and sell diet pills. Mr. Savage and Mr. Robinson split the cost of a rent-a-car to drive to Los Angeles. Mr. Robinson drove with Savage to Worrell's residence and saw Savage commit the assault.

The principal evidence introduced against Mr. Robinson at trial consisted of statements he made to the police during custodial interrogation.[1] The police extracted these statements from Mr. Robinson after approximately four hours of cajoling, pressuring, and deception, without first obtaining a valid waiver of Mr. Robinson's Fifth Amendment rights, and after completely ignoring Mr. Robinson's request for the assistance of counsel.

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[1] The State has never argued, nor could it argue, that any error in introducing Mr. Robinson's statements was harmless.

2. The Interrogation

a. The initial advisement

Mr. Robinson was interrogated for approximately four and one-half hours by three investigating officers. At the beginning of their interrogation, the police advised Mr. Robinson of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The advisement concluded with this colloquy:

> [DETECTIVE TRUE]: This, this is what I'm asking you. Do you give up the right to have an attorney present during our questioning right now.
>
> [ROBINSON]: *If I say yes, I'd want an attorney then I'd have to get one here, is that right*? (Unintelligible). Yeah, I give it up, yeah, yeah.[2]

TR:1-2 (emphasis added).[3]

---

[2] The government argues that Mr. Robinson "repeatedly expressed his willingness to waive [his] rights and answer questions." Petition for Writ of Certiorari at 3. However, after stating that he would answer questions without an attorney, Mr. Robinson asked a question regarding his right to have counsel appointed; this question demonstrates that Mr. Robinson did *not* in fact understand that he could have counsel appointed to be present during the interrogation. Moreover, throughout the interrogation, Mr. Robinson continued to express uncertainty regarding his right to counsel, and finally stated point blank that he needed an attorney.

[3] The interrogation transcript was filed as an exhibit in the district court. References to the transcript will be made as "TR: ___".

The police made no verbal response to Mr. Robinson's question regarding his right to an attorney.[4] Instead, they proceeded immediately with their interrogation.

b. Affirmative misrepresentations and misconduct by the police

The officers employed a variety of tactics in an attempt to induce Mr. Robinson to incriminate himself. Perhaps the most egregious tactic was the officers' affirmative misrepresentation of the law to Mr. Robinson. The officers told Mr. Robinson that if he exercised his right to remain silent and not answer their questions, the prosecution could introduce his silence into evidence and the jury could hold it against him:

> Let's say first . . . there's three guys . . . you, and two others. All right. And . . . we go to court on this thing, all right? And there's the three of you, sittin' at the damned table in court, O.K.? This man . . . states such-and-such a thing, and this guy . . . he say this . . . and that you did this, and this guy say you did that. This one says it wasn't his idea, I don't know anything. *And you sit there and the detective goes up and testify [sic] before a jury . . . "Did you talk to this guy?" "Yes." "What'd he tell you?" "Nothin'."* "What did this guy say?" "He said such-and-such." He gets up

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[4] As Mr. Robinson explained, he had received a non-verbal response to his question. One of the officers stood behind the other two and nodded his head affirmatively in response to the question. *See* Traverse to Respondent [sic] Order To Show Cause and Memorandum of Points and Authorities (filed in the district court), hereafter "Traverse," at 11.

> there, takes the stand and testifies . . . *where do you think that leaves you? What do you think these people sittin' on the jury is going to think, O.K.?* All they can do is rely on what they hear, what you say, what the other parties say.

TR:41 (emphasis added).

At the same time the officers told Mr. Robinson that his silence could be used against him at trial, they told him they were not really interested in pursuing him as a defendant. For example, the officers assured Mr. Robinson that they saw Rick Monday (aka co-defendant Bobby Ray Savage) as the truly culpable party; they told Mr. Robinson, "that's who we're interested in." TR:2 One detective told him, "you know who I'm really after . . . . No one's trying to fuck over you." TR:36 The detectives urged Mr. Robinson not to be the "fall guy"; one said "I think it's chicken shit if you're gonna take the fall for this murder." TR:18 Later, another said, "I bet you were a fall guy on this." TR:33 One said, "[y]ou're . . . protecting someone that doesn't give a shit about you. . . . I don't think you're that dumb." TR:24 They told him, "[y]ou know, now's the time to talk for yourself, Rick." TR:40

The officers repeatedly suggested to Mr. Robinson that it was in his interest to make a statement, because by doing so he could establish he was less responsible for the murder than co-defendant Savage. Detective Ferrand told Mr. Robinson, "[i]f you were just there and saw it go down . . . you tell me about it . . . " TR:24 Later, he stated: "There's a difference in throwing it and seeing someone do it . . . O.K.? You understand that? There's a big difference . . . " TR:31 He explained the situation to Mr. Robinson as follows:

> The difference is, if you have one guy that go out and looked for someone to do something to – some injury to someone – O.K., he is number one, O.K.? He thought of the idea. He went out. He contacted someone, or he contacted two people, or – let's say he contacted one guy. And this guy in turn cons someone, gets someone to go along with him for the ride, or whatever, O.K.? And this guy assaults this person and he is present, O.K.? Who are the bad guys? Who are the A number one guys that you think that the State of California would be more interested in? TR:37

Mr. Robinson answered: "The guy who thought it up, the guy who had the money, and the guy who committed the crime." Detective Ferrand responded: "All right." *Id.*

Although Detective Ferrand acknowledged that he could not tell the District Attorney how to handle the case, he nevertheless pressured Robinson to confess: "You would be admitting guilt that you saw something . . . an assault go down, you were there, O.K.? But it's not like if uh . . . you did the assault yourself, O.K.?" TR:38 Ferrand also claimed that the District Attorney would be more lenient with Mr. Robinson if he confessed:

> And if you're going to . . . assist us and telling [sic] us they're [sic] involvement in this thing- . . . that's what I go before the District Attorney with, O.K.? And that's what goes before the court, O.K.? And how the court looks upon that . . . I think it would be . . . in a sense, better than going before the court with nothing from you but other people's statements, O.K.? Now that's what you got to think about . . . " TR:44-5

c. Mr. Robinson's request for counsel

Throughout the interrogation, Mr. Robinson expressed concern about his right to counsel. At one point during the interrogation, Detective True asked Mr. Robinson if he knew what murder meant. Mr. Robinson replied: "Yes . . . yes . . . yes, I do, I do. Believe me, I do. And that's why, you know, I, hey . . . I . . . I mean, I froze, man. I didn't know if I should say to hell with it let me out, *if I should get an attorney*; I didn't know what to do, man." TR:18 (emphasis added). Later, Mr. Robinson stated: "you tried . . . you tried to (unintelligible) here, man. *Maybe I shoulda got an attorney, man, 'cause . . .* " The police ignored this statement. TR:26 After further questioning, the following dialogue occurred:

> [ROBINSON]: Man . . . can I make a phone call?
>
> [DETECTIVE TRUE]: Hey, I was going to play a . . . portion of a tape for you in a second; I want you to listen to it, O.K.? TR:33

After ignoring this request for a telephone call, the police renewed their attack. Mr. Robinson once more attempted to make a phone call, making it clear that he wanted to do so to obtain counsel:

> [ROBINSON]: *I have to get me a good lawyer, man. Can I make a phone call?*
>
> [DETECTIVE FERRAND]: Sure. We'll let you make a phone call . . . local? Hey, you wanta call Mr. Monday [co- defendant Bobby Ray Savage]?
>
> [ROBINSON]: No.

> [DETECTIVE FERRAND]: Do you know where . . . he is located?
>
> [ROBINSON]: I wish I did.
>
> [DETECTIVE FERRAND]: I know where he's located. I know where this guy is located, too.
>
> [DETECTIVE GUARINO]: It's just a matter of time. It's just a matter of going there and gettin' 'em. You have a good opportunity . . .
>
> [ROBINSON]: . . . I guess these two guys have track records, or sumpin', huh?
>
> [DETECTIVE GUARINO]: . . . to give us your (unintelligible). Hey . . . well, we're givin' you the opportunity to give us your side of the story right now, uh . . .

TR: 45-46 (emphasis added). Mr. Robinson ultimately stated that he wanted to call his mother in Pittsburgh; the officers urged Mr. Robinson to tell his mother he'd been "set up."[5] It was after Mr. Robinson made this phone call that the police elicited the incriminating statements which were the subject of his pretrial motion to suppress.[6]

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[5] Mr. Robinson, of course, was still under the impression that it was his obligation to obtain counsel for himself.

[6] The government contends that Mr. Robinson admitted that he and Savage had "hired themselves out" to Gilman. Petition for Writ of Certiorari at 6. However, as the evidence presented at trial demonstrates, Gilman met and hired Savage; Savage, in turn, talked Robinson into driving to Los Angeles with him.

3. The State Court Proceedings

The state appellate court affirmed Robinson's conviction, holding that the trial court's ruling admitting Mr. Robinson's statements was "amply supported by the record." *People v. Gilman and Robinson*, 2d Crim. No. 42532 (Cal. App. 1984) (unpublished opinion) at 27. The court stated that Mr. Robinson was "ruminating to himself, and not asking a question of the officers" when he asked during the initial advisement, "[i]f I say yes, I'd want an attorney, then I'd have to get one here, is that right?" *Id.*

The California Supreme Court denied Robinson's petition for hearing on June 30, 1984. Mr. Robinson subsequently filed two *pro se* habeas petitions with the California Supreme Court; in both, he alleged that he had not made a valid waiver of his *Miranda* rights prior to the interrogation, and that the police had ignored his request for counsel during the interrogation. The first petition was denied on grounds of insufficient particularity on February 26, 1986. The second was denied October 15, 1986; the court cited a rule against repetitive petitions.[7] *See* Report and Recommendation of United States Magistrate, hereafter "Report and Recommendation," at 4.

The district court found that Mr. Robinson had indeed "presented his claims with 'as much particularity as is practicable' . . . . The California Supreme Court's failure to reach the merits of those claims should not prevent review in this court." *Id.* at 5 (citation omitted).

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[7] The rulings are logically inexplicable. If the first petition was insufficient in particularity, it could not be a predicate for dismissal of the second as repetitive.

4. The Federal Court Proceedings

Mr. Robinson subsequently filed the *pro se* federal habeas corpus petition which is the subject of this case.[8] Mr. Robinson again asserted that he had not made a valid waiver of his *Miranda* rights, and that the police had ignored his request for counsel.[9] The order denying his petition was entered on September 13, 1988. Mr. Robinson was not granted an evidentiary hearing. The Magistrate's Report and Recommendation, adopted without modification by the district court, ruled that Mr. Robinson had exhausted his state remedies, and that *Stone v. Powell*, 428 U.S. 465 (1976) did not foreclose review of his *Miranda* claims. The district court held that Mr. Robinson "knowingly and voluntarily" waived his right to have an attorney present during questioning, and that Mr. Robinson

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[8] As the State points out, Robinson simultaneously filed a separate federal habeas petition, alleging that his counsel was deficient in failing to investigate the issue that Mr. Robinson was too intoxicated during the interrogation to make a valid waiver. The State characterizes this petition as "inconsistent;" however, it is perfectly in keeping with his other arguments. Mr. Robinson has always maintained that he did not make a knowing and intelligent waiver of his right to counsel, and that after requesting counsel, he called his mother because he did not understand that he was entitled to have counsel appointed for him. There is nothing inconsistent about the suggestion that his intoxication may have contributed to his misunderstanding.

[9] Despite the State's suggestion to the contrary, Mr. Robinson *did* in fact assert that he was coerced by the police to waive his rights and incriminate himself, and provided a copy of the transcript of his interrogation to the court as proof of that assertion. *See* Traverse at 10.

never made a proper request for the presence of an attorney. Report and Recommendation at 5-7.

Mr. Robinson's appeal from the district court's denial of his petition for a writ of habeas corpus presented two issues for review. First, Mr. Robinson had not knowingly and intelligently waived his right to counsel during custodial interrogation by police. Second, Mr. Robinson requested counsel later in the interrogation and, despite this request, the police continued their interrogation without counsel being present.

The majority of the Ninth Circuit panel that heard this case determined that Mr. Robinson's statement: "I have to get me a good lawyer, man. Can I make a phone call?" amounted to an unequivocal request for counsel. Although it found the initial waiver issue to be one of "serious concern," *Robinson v. Borg*, No. 89-55126 Slip Op. at 15151-52 n.1 (9th Cir. December 11, 1990) (as amended), the majority found it unnecessary to reach the issue because its holding that Mr. Robinson unequivocally requested counsel required suppression of the statements which were introduced against him at trial. The majority did not address the State's contention that *Stone v. Powell* should be extended to foreclose claims such as Robinson's.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Case Does Not Present a "Mere" *Miranda* Violation: Mr. Robinson's Fifth and Fourteenth Amendment Rights Were Violated

a. The officers compelled Mr. Robinson to incriminate himself by refusing to acknowledge his request for counsel

In this case, the officers went far beyond a "technical" violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and affirmatively deprived Mr. Robinson of his Fifth and Fourteenth Amendment rights. The police flatly ignored Mr. Robinson's request for counsel, and continued to interrogate him despite his request. The Ninth Circuit ruled that Mr. Robinson's confession was inadmissible because it was obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Robinson v. Borg*, Slip op. at 15155-56.

The *Edwards* rule is "designed to protect an accused in police custody from being badgered by police officers." *Smith v. Illinois*, 469 U.S. 91, 95 n.2 (1984) (quoting *Wyrick v. Fields*, 459 U.S. 42, 45-6 (1982) (*per curiam*)). An *Edwards* violation differs significantly from a mere failure to administer some portion of the *Miranda* warnings.[10] Where the claimed violation is a defect in the language used in the *Miranda* advisement, it could be perfectly obvious to all concerned that the suspect was completely

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[10] For an example of a claimed technical violation of *Miranda*, *see Duckworth v. Eagan*, 492 U.S. 195 (1990) (state prisoner alleged that the officers' advisement that he would be entitled to appointed counsel "if and when [he went] to court" did not adequately apprise him of his right to appointed counsel).

willing to submit to questioning, and that the suspect had voluntarily confessed even though *Miranda* was violated. However, when a suspect requests an attorney and the request is ignored, it is difficult to suggest that the resulting statements were voluntarily given. In *Oregon v. Elstad*, 470 U.S. 298 (1985), Justice O'Connor, writing for the Court, found no Fifth Amendment violation in a mere failure to administer *Miranda* warnings. She distinguished the cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." *Id.* at 312-13 n.3 (citations omitted).

The State asserts that Mr. Robinson's *Miranda-Edwards* claim does not establish a constitutional violation. It may be that portions of the *Miranda* rule "sweep more broadly" than the Fifth Amendment. But the very core of *Miranda* is the holding that the Fifth Amendment guarantees the right to counsel during a custodial interrogation. *Miranda v. Arizona*, 389 U.S. at 469. *Edwards* protects that right. When the State disregards an express request for counsel, the State deprives a suspect of his Fifth and Fourteenth Amendment rights:

> In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation – without counsel present – after he requested an attorney.

Shea v. Louisiana, 470 U.S. 51, 52 (1984); *see also Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486, 489 (1990) ("[W]e

decide that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel"). In *Shea*, the Court held that *Edwards* described a constitutional rule, which should be applied retroactively to cases pending on direct appeal. *Shea*, 470 U.S. at 52, 59.

This case, like *Minnick v. Mississippi*, demonstrates the importance of providing counsel – when counsel is requested – during questioning. Here, the officers told Mr. Robinson that his post-arrest silence could be used against him at trial.[11] The officers also said that there was a difference between Mr. Robinson's alleged role in the offense and that of Gilman and Savage. In *Minnick*, this Court noted that "[i]f the authorities had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all. *Minnick, supra*, 111 S. Ct. at 491. Mr. Robinson, similarly confused, would have benefitted from the advice of counsel. *See also Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("Because of [the] special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in

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[11] The officers told Mr. Robinson that if he remained silent a detective could take the stand during trial and testify that Mr. Robinson had refused to talk to the officers. The interrogating officers also said that the jury could hold Mr. Robinson's silence against him. Of course, the interrogating officers completely misrepresented the law. Under *Doyle v. Ohio*, 426 U.S. 610 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the State cannot comment upon a defendant's assertion of his Fifth Amendment right to remain silent.

the adversary process, . . . 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . . ' " (quoting *Miranda v. Arizona,* 384 U.S. at 469)).

The government asserts that Mr. Robinson has never alleged "governmental coercion that characterizes a true Fifth Amendment self-incrimination violation." Petition for Writ of Certiorari at 17. But a demonstrated violation of *Edwards* gives rise to a presumption that the resulting confession was compelled. Once an accused has requested counsel,

> it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice White has explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (Citation omitted).

Arizona v. Roberson, 486 U.S. 675, 681 (1988); *see also Michigan v. Harvey,* ___ U.S. ___, 110 S.Ct. 1176, 1180 (1990) ("*Edwards* . . . is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations").

A review of the transcript of the interrogation demonstrates that the police actually made an affirmative (and ultimately successful) attempt to dissuade Robinson

from exercising his right to counsel. When Mr. Robinson said "I have to get me a good lawyer, man. Can I make a phone call?" the officers first encouraged him to call co-defendant Savage. Next, they reminded Mr. Robinson that they were "givin' [him] the opportunity to give [them his] side of the story right now . . . ," and balked at allowing Mr. Robinson to use the phone when he stated that he wanted to call his mother in Pennsylvania. Finally, the officers encouraged him to tell his mother that he'd been "used . . . set up, set up by two paddies . . . . " This continued interrogation and coercive behavior deprived Mr. Robinson of his Fifth and Fourteenth Amendment rights.

b. The coercion in the present case goes beyond the officers' refusal to honor Mr. Robinson's request for counsel

The court of appeals' decision focused solely on the *Edwards* violation presented in this case. However, Mr. Robinson asserted other claims demonstrating that police misconduct during the interrogation resulted in violation of Mr. Robinson's Fifth and Fourteenth Amendment rights.

The court of appeals never reached the issue of whether Mr. Robinson made a voluntary, knowing and intelligent waiver of his rights during the initial advisement. In his *pro se* pleadings filed in the district court, Robinson stated:

> The only susceptible reason why three (3) detecteives chose not to answer Petitioner question or clarify Petitioner right to counsel, that they

> intended to *deceive* Petitioner about his right to counsel. . . . The record clearly shows that Petitioner was under the impression that he (Petitioner) would have to get his own attorney. . . . The record also shows that there were coercion by the Detectives throughout the interrogation, were detectives was making sure that Petitioner beleived he was'nt the one they realy wanted.

Traverse at 9-10 (citation omitted; emphasis and spelling as in original). The court of appeals did not reach this issue, but noted that it was a matter of substantial concern. Further, as stated previously, the officers went beyond misleading Mr. Robinson. They lied to him about the prosecutor's ability to make use of his refusal to speak to the officers, they lied to him about whether he was a prime target of the investigation and they lied to him about the legal consequences of his alleged role in the offense.[12]

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[12] The interrogators' conduct was not good police work. As a classic text instructs, an interrogator must not make any comment to the effect that blame cast on an accomplice relieves a suspect of legal responsibility for the suspect's part in an offense. F. Inbau, J. Reid, J. Buckley, *Criminal Interrogation and Confessions* at 114 (3d ed. 1986). Further, an interrogator should not point out the consequences of a confession or hold out any inducement, because any such inducement may improperly coerce a confession. *Id.* at 197. Finally, as already set forth in footnote 11, *supra*, the officers affirmatively misrepresented the legal effect of Mr. Robinson's exercise of his Fifth Amendment right to remain silent.

2. The Reasoning of *Stone v. Powell* Does Not Apply to This Case

The State argues that the reasoning of *Stone v. Powell*, 428 U.S. 465 (1976) should be applied to the present case to prevent Mr. Robinson from asserting his claims on federal habeas corpus. The justifications behind the *Powell* decision, however, do not support a refusal to allow state prisoners to litigate Fifth Amendment violations on federal habeas corpus.

Powell's prohibition is based on the premise that the Exclusionary Rule is not mandated by the Fourth Amendment, but is instead a prophylactic designed to deter police from violating suspects' right to be free from unlawful searches and seizures. 428 U.S. at 486. By the time a state prisoner's claims reach federal habeas corpus, the argument goes, any deterrence value in excluding the evidence is outweighed by the detriment to the criminal justice system caused by the suppression of reliable and probative evidence. *Id.* at 492-94.

There are two problems with this argument as applied to this case. First, "a Fifth Amendment violation may be more likely to affect the truth-finding process than a Fourth Amendment violation." *Shea v. Louisiana*, 470 U.S. 51, 59 (1985). Thus, in framing the Fifth Amendment Exclusionary Rule, courts seek to protect that process as well as to deter police from engaging in unduly coercive conduct. The Fifth Amendment's Exclusionary Rule does not exist merely to deter the police from engaging in improper tactics. Rather,

> [t]he [Fifth] Amendment has its roots in the Framers' belief that a system of justice in which

> the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process. *The suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself.*

Duckworth v. Eagan, 492 U.S. 195, 209 (1990) (O'Connor, J., concurring) (citation omitted; emphasis added).

Second, this case does not involve a "mere" or "technical" *Miranda* violation and the rule of *Stone v. Powell* should not apply.[13] Notwithstanding the State's contention to the contrary, Mr. Robinson has always asserted that police misconduct during the interrogation resulted

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[13] It has been suggested that the *Powell* rule should be extended to state prisoners' claims of "mere" *Miranda* violations: some argue that the *Miranda* warnings, like the Fourth Amendment Exclusionary Rule, are not constitutionally mandated but are a prophylactic measure designed to ensure protection of a suspect's Fifth Amendment rights and to deter police misconduct. Thus, even though the *Miranda* warnings may be defective in a given case, the argument holds that if the suspect's decision to speak to police is otherwise voluntary, the suspect's Fifth Amendment rights have not necessarily been violated. Therefore, *Powell*'s utilitarian analysis arguably would support a claim that the deterrent effect of excluding testimony obtained in technical violation of *Miranda* is outweighed by the other interests at stake. This argument is necessarily limited to non-constitutional claims under *Miranda*. *See Duckworth v. Eagan*, 495 U.S. 195, 212 (1990) (O'Connor, J., concurring).

in his compelled self-incrimination, and the transcript of the interrogation bears this out. The reasoning of *Stone v. Powell* cannot legitimately be extended to claims of full-blown Fifth Amendment violations such as the one at issue here. Indeed, the State concedes as much when it argues that the *Powell* rule should be extended only to claims in which the confession was "otherwise voluntary." Petition for Writ of Certiorari at 13.

3. Congress, Not This Court, Should Decide Whether To Extend *Stone v. Powell* to *Miranda* Violations

This Court should deny the State's petition; this case is not appropriate for review. *Stare decisis* compels this Court to adhere to settled principles of constitutional law. Litigants have long relied upon the federal courts to enforce the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981), and the federal courts must retain the ability to remedy Fifth and Fourteenth Amendment violations in egregious cases. In addition, Congress is currently considering amendments to 28 U.S.C. section 2254 that would accomplish all the State seeks. Any change to the law in this important area should come from the Congress and not from this Court.

This Court has long recognized that *Miranda* and *Edwards* violations are cognizable on federal habeas corpus, and this Court has reached the merits of these

cases on numerous occasions.[14] The Court should be reluctant to abandon this long-held rule. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597, 2609 (1991). Moreover, "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). The State cannot meet this heavy burden; there are no changes in the law or in society that would dictate abandoning this Court's long-held rule.

The State suggests that certiorari should be granted in this case because, among other things, "federal *habeas*

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[14] *See Duckworth v. Eagan*, 492 U.S. 195 (1989) (respondent sought habeas corpus relief in federal court claiming that his confession was inadmissible due to *Miranda* violations); *Moran v. Burbine*, 475 U.S. 412 (1986) (petitioner sought federal habeas corpus relief because police did not properly adhere to *Miranda* procedures); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (habeas corpus relief sought contending that roadside questioning of a motorist detained pursuant to a traffic stop is custodial interrogation for *Miranda* purposes); *Estelle v. Smith*, 451 U.S. 454 (1981) (respondent sought federal habeas corpus relief based on the use of statements he made to his psychiatrist without being advised of his Fifth Amendment rights); *Michigan v. Tucker*, 417 U.S. 433 (1974) (respondent sought federal habeas corpus relief contending certain testimony was inadmissible due to a *Miranda* violation).

review of state prisoners' *Miranda* claims occurs regularly." Petition for Writ of Certiorari at 13 n.5. To support this contention, the State cites three cases decided this year by federal appellate courts. What does not occur regularly, however, is federal court *reversal* of state convictions based on *Miranda* claims. In all three cases cited by the State, the courts of appeals affirmed the district courts' denial of petitions for writs of habeas corpus. *See Hill v. Lockhart*, 927 F.2d 340 (8th Cir. 1991); *Lobosco v. Thomas*, 928 F.2d 1054 (11th Cir. 1991); and *Henderson v. Duggs*, 925 F.2d 1309 (11th Cir. 1991).

The distinction is important, because it demonstrates that the system is working as it should be. Federal habeas corpus review under 28 U.S.C. section 2254 ensures that the states enforce individual constitutional rights. If the states are faithful to the Constitution in the vast majority of cases, it is safe to assume that the federal courts will not overturn state convictions absent truly deplorable conduct. But when an egregious case – such as this one – arises, federal habeas corpus must be available to protect individual constitutional rights.

Finally, the Congress is currently considering whether to amend 28 U.S.C. section 2254. One proposed bill, S. 635, 102d Cong., 1st Sess. (1991), has already passed the Senate. S. 635 would amend section 2254 to require the federal courts to deny state prisoners' applications for writs of federal habeas corpus "with respect to any claim that has been fully and fairly adjudicated in State proceedings." S. 635, 102d Cong., 1st Sess. § 205, 137 Cong. Rec. S3193, S3199 (daily ed. Mar. 13, 1991). The amendments contained in S. 635 would thus sweep even more broadly than the rule the State asks this Court to

adopt in this case. The bill was introduced in the House of Representatives as H.R. 1400, 102d Cong., 1st Sess. (1991). *See* 137 Cong. Rec. H1669 (daily ed. Mar. 12, 1991).

In *Vasquez v. Hillery*, 474 U.S. 254 (1986), this Court declined to adopt a rule that would prohibit federal courts from granting habeas corpus relief because of potential prejudice to the prosecution. This Court noted that Congress, despite many attempts, had not created a statute of limitations in habeas corpus cases. As the *Hillery* Court held, "[w]e should not lightly create a new judicial rule, in the guise of constitutional interpretation, to achieve the same end." *Id.* at 265.[15] Since the Congress is currently considering amending section 2254, which would restrict the federal courts' habeas corpus jurisdiction, this Court should refrain from acting. The State's petition for writ of certiorari should be denied lest this Court interfere with the Congress' power to delineate the appropriate jurisdiction of the federal courts.

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[15] Arguments against *stare decisis* are perhaps strongest where "correction through legislative action is practically impossible." *Payne v. Tennessee*, 111 S.Ct. at 2610, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932). Here, of course, the Senate has already passed a bill amending section 2254, and the same legislation is pending in the House of Representatives. It cannot be said that the legislature is incapable of making any "corrections," if corrections are indeed necessary.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DENNIS E. CURTIS*
CHARLES D. WEISSELBERG
MICHAEL J. BRENNAN
University of Southern
California Law Center
University Park
Los Angeles, California
90089-0071
Telephone: (213) 740-4788

SHAUNA WEEKS
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071

Attorneys for Respondent
*Counsel of Record

On the Respondent's Brief:

ELIZABETH OTTER
Law Student Intern
Class of 1993